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December 15, 1994

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DEC 15 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**BY HAND**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Opposition to Petition for Reconsideration  
and Request for Expedited Action By TKR  
Cable Company of the Fourth Order on  
Reconsideration in MM Docket No. 92-266

Dear Mr. Caton:

Please find enclosed, on behalf of the City of New York and the National Association of Telecommunications Officers and Advisors, an original and eleven (11) copies of the Opposition to the Petition for Reconsideration and Request for Expedited Action filed by TKR Cable Company in the above-referenced proceeding.

Thank you for your attention to this matter.  
Please call the undersigned if you have any questions.

Sincerely,

*William E. Cook, Jr.*  
William E. Cook, Jr.

Enclosures

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Before the  
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OFFICE OF SECRETARY

In the Matter of )

Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )

Rate Regulation )

MM Docket No. 92-266

DEC 15 1994

TO: The Commission

**OPPOSITION BY THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS  
AND THE CITY OF NEW YORK TO THE  
PETITION FOR RECONSIDERATION BY TKR CABLE COMPANY**

Norman M. Sinel  
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Counsel for the Local Governments

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**OPPOSITION BY THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS  
AND THE CITY OF NEW YORK TO THE  
PETITION FOR RECONSIDERATION BY TKR CABLE COMPANY**

Pursuant to 47 C.F.R. § 1.429(f), the National Association of Telecommunications Officers and Advisors and the City of New York (collectively, the "Local Governments") hereby submit this Opposition to the Petition for Reconsideration and Request for Expedited Action filed by TKR Cable Company ("TKR") on October 19, 1994.

The Local Governments oppose the request by TKR that the Federal Communications Commission ("FCC" or "Commission") reconsider the Fourth Order on Reconsideration<sup>1</sup> in the above-captioned proceeding and

<sup>1</sup> In re Implementation of Sections of the Cable  
[Footnote continued on next page]

permit cable operators to: (a) pass-through external cost increases without prior review by a franchising authority; and (b) recover the cumulative amount of all external costs previously incurred but not passed through in a manner similar to the prorated recovery allowed for FCC regulatory fees. The Local Governments oppose TKR's Petition because, as explained below, TKR's request is not properly before the Commission and is not in the public interest.

#### **DISCUSSION**

##### **I. The Commission Should Deny TKR's Request Since It Is Not Properly Before the Commission**

TKR's Petition should be denied since it is not properly before the Commission. Although TKR styles its Petition as a petition for reconsideration of the Fourth Order, the Petition does not request that the Commission reconsider the only two decisions made by the Commission in that Order: (a) the right of cable operators to pass through alleged increases in franchise fees without prior regulatory review; and (b) the external cost treatment of the Commission's regulatory fees. Instead, TKR is essentially asking the Commission to reconsider

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[Footnote continued from previous page]  
Television Consumer Protection and Competition Act of 1992: Rate Regulation, Fourth Order on Reconsideration (MM Docket No. 92-266), FCC 94-254 (released October 5, 1994) ("Fourth Order").

the adoption by the Commission in the Report and Order in this proceeding of 47 C.F.R. § 76.933(a), which establishes the time period for a franchising authority to review a proposed rate increase, and the adoption by the Commission in its Second Order on Reconsideration of 47 C.F.R. § 76.922(d)(3), which governs the right of a cable operator to file FCC Form 1210 to request an external cost increase.<sup>2</sup> The time periods to file a request for reconsideration or clarification of these sections have long since passed.<sup>3</sup> Hence, the Commission must deny TKR's Petition.

**II. The Commission Should Not Permit Cable Operators to Automatically Pass Through External Costs Increases Without Prior Review by a Franchising Authority**

**A. Section 76.933 Applies to Requests for External Cost Increases**

Despite the procedural bar to its claim, TKR now belatedly asserts that Section 76.933 is "unclear" with regard to whether existing or proposed rates are effective during the tolling period under Section

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<sup>2</sup> See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, 7 FCC Rcd. 5631 (1993); and In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, 9 FCC Rcd. 4119 (1994).

<sup>3</sup> TKR's other option is to file a petition for rulemaking, which it has not chosen to do. See 47 C.F.R. § 1.401 (1993).

76.933(b). See Petition at 3. Such an assertion is false. There is no ambiguity under the Commission's rules regarding the right of franchising authorities to toll the effective date of a proposed rate increase -- for an external cost increase or any other rate increase -- under Section 76.933.

Section 76.933 by its terms applies to any "proposed increase" in basic service tier or equipment rates. See 47 C.F.R. § 76.933(a). The section further states that a franchising authority may "toll" the period for making a rate decision by an additional 90 or 150 days, as applicable. 47 C.F.R. § 76.933(b). The Commission clearly stated in the Report and Order that the "franchising authority may toll the effective date of the proposed rates" during the additional 90 or 150 day review period. See Report and Order, 7 FCC Rcd. at 5709, ¶ 119 (emphasis added). Only if the franchising authority is still unable to make a rate decision after the additional 90 or 150 day period is a cable operator then able to impose a rate increase, subject to refunds if the franchising authority issues an accounting order and subsequently orders a rate reduction. 47 C.F.R. §76.933(c).

TKR next suggests that the Commission intended for a franchising authority to have only 30 days to review a proposed external cost rate increase before

such an increase becomes effective. However, nothing in Section 76.933, nor in any of the Commission's other cable rate rules, suggest that requests for external costs increases are not subject to the time periods under Section 76.933.<sup>4</sup>

The Fourth Order simply stated a fact that is apparent from the Commission's rules -- that the rate review and tolling provisions in Section 76.933 apply to requests for external rate increases. See Fourth Order at ¶ 2. Hence, the Commission did not adopt any new rule or interpretation of its rules that would be the proper subject of a petition for reconsideration.

**B. TKR's Request Is Not in the Public Interest**

The Commission also should deny TKR's Petition because a rule permitting a cable operator to pass through external costs without prior approval by the local franchising authority is not in the public interest. Under the rules, the definition of, and the amount properly attributable to, allowed external cost increases is a matter of disagreement between cable operators and franchising authorities. Moreover, as a practical matter, franchising authorities would find it difficult to reach a rate determination in 30 days,

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<sup>4</sup> The only exception, of course, are those created in the Fourth Order on Reconsideration for franchise fees and the Commission's regulatory fees.

particularly since cable operators fail to submit with the FCC Forms all the information a franchising authority needs to make a rate determination. Franchising authorities have found that, in most instances, cable operators fail to include all information required by the FCC Forms and take an unreasonable amount of time to respond, if at all, to a franchising authority's request for information necessary to complete its review. If the Commission granted TKR's Petition, cable operators would have the unfettered ability to pass through potentially unreasonable rate increases under the guise of external costs to subscribers, and, therefore, would have no incentive to provide within a reasonable period of time -- or to provide at all -- the information a franchising authority needs to complete its review of the rate submission.<sup>5</sup>

Although a franchising authority retains the right to order refunds if the authority determines that an operator passed through unreasonable rate increases,

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<sup>5</sup> On November 21, 1994, the Local Governments filed a Petition for Reconsideration of the Fourth Order requesting that the Commission reconsider its rule permitting cable operators to pass through two categories of external costs -- franchise fees and the Commission's regulatory fees -- without prior review by a franchising authority in order to ensure that cable subscribers do not pay unreasonable rates for cable service.



cable subscribers should not have to pay unreasonable cable rates until the franchising authority issues a rate order requiring refunds and a rate reduction. Moreover, given that a cable operator has the option of refunding overpayments to a class of subscribers rather than to actual subscribers, individual cable subscribers may not be protected. For example, cable subscribers who paid the external cost overcharge and who disconnected cable service before a refund was ordered, probably would not receive a refund.

In addition, the cable operator will argue, for example, that it has the right to offset any unreasonable rates paid by a particular cable subscriber by undercharges for other services that subscriber did not have -- thus depriving that particular subscriber of the full amount such subscriber actually paid in overcharges.

There is no convincing reason to treat external cost increases differently than any other proposed rate increase for purposes of regulatory review. It is just as imperative that franchising authorities have the ability to review the reasonableness of alleged increases in external costs, as it is for them to review any other rate increase. To a subscriber, there is no difference between an overcharge by an operator for an external cost increase and an overcharge for other rate

increases. The result is the same, an overpayment by the subscriber for cable service.

The Commission should not create artificial distinctions between unreasonable charges by cable operators for external costs and unreasonable charges by cable operators for other cable rate increases by treating them differently for regulatory purposes. The Commission, therefore, should deny TKR's Petition.

**III. The Commission Should Not Permit Cable Operators to Pass Through External Costs on a Cumulative Basis**

The Commission should deny TKR's request that cable operators be permitted to pass through on a prorated basis external costs incurred prior to the submission and approval of an external cost increase request. In addition to the procedural bar to its request, TKR has not provided a convincing reason for permitting such pass-throughs. TKR's alleged concerns about cable operators not being able to recover incurred external costs can be alleviated if cable operators cooperate with franchising authorities during the rate process by providing all information required on the relevant FCC Forms, and by promptly responding to information requests by franchising authorities. Such cooperation should result in a shorter rate review period.

Moreover, cable operators can alleviate concerns about incurred costs by simply ensuring that any budgetary increases, new investments or other increased expenditures coincide with the FCC Form 1210 approval process. The Local Governments find it hard to believe that cable operators, who are accustomed to preparing yearly budgets and who know in advance when programming contracts will expire, do not know in advance what costs may be incurred during the coming year.

Also, franchising authorities have discovered that cable operators will establish a rate allegedly based on the cost for new equipment, services or an external cost without at such time determining how such cost may be justified on the FCC Form 1210. As a result, the delay in an operator's ability to recoup such costs is the result of delays by the cable operator in putting together the justification required by the FCC Form 1210 for such rate. Cable operators could eliminate the delay for recouping external costs if they prepared the justification required by the FCC Forms for such costs at the time they begin to incur them and submitted such justification to the franchising authority soon thereafter.


Moreover, for the reasons given in Section II of this Opposition, TKR's request also is not in the public interest since it would permit cable operators to pass

through unreasonable rate increases without prior regulatory review.

**CONCLUSION**

For the reasons stated above, the Local Governments urge the Commission to deny TKR's Petition.

Respectfully Submitted,

  
Norman M. Sinel  
Stephanie M. Philipps  
William E. Cook, Jr.

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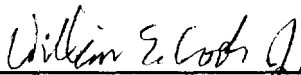
Counsel for Local Governments

December 15, 1994

**CERTIFICATE OF SERVICE**

I, William Cook, an attorney at the law firm of Arnold & Porter, hereby certify that a copy of the foregoing "OPPOSITION BY NATOA AND THE CITY OF NEW YORK TO THE PETITION FOR RECONSIDERATION BY TKR CABLE COMPANY" was served on December 15, 1994 by first class mail, postage prepaid, to:

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\_\_\_\_\_  
William E. Cook, Jr.